

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

LISA HUTCHINS and)	
DUSTIN HUTCHINS,)	
)	
Plaintiffs,)	
)	
v.)	No. 2:00-CV-457
)	
MICHAEL PETERSON,)	
SHAWN LUNDRIGAN, and)	
THOMAS L'ESPERANCE,)	
)	
Defendants.)	

OPINION AND ORDER

In this civil rights action arising from the allegedly unlawful arrest and prosecution of Plaintiff Lisa Hutchins for distribution of crack cocaine, Defendant police officers Michael Peterson, Shawn Lundrigan and Thomas L'Esperance have moved for summary judgment in their favor on all claims brought against them. For the reasons that follow, the Defendants' motions (Docs. 96, 102 & 106) are granted in part, and the case is remanded to state court for determination of the state law issues that remain.

I. Background

For purposes of determining these motions, the following material facts are taken as true. In the fall of 1997, the Southern Vermont Drug Task Force was conducting an investigation of a crack house located at 44 Maple Street in Brattleboro, Vermont. Defendant Thomas L'Esperance was a supervisor for the task force. Defendant Shawn Lundrigan was a member of the task

force, assigned as an undercover officer. Defendant Michael Peterson was a detective with the Brattleboro Police Department, serving as local contact to the task force.

In connection with their investigation, the task force hid a video camera in a van in a driveway across the street from 44 Maple Street to videotape persons entering and leaving the front entrance of the building. On November 3, 1997, the camera operated from 9:15 a.m. until 4:30 p.m. The videotape of that day does not show Lisa Hutchins entering or leaving 44 Maple Street from the entrance under surveillance. There was, however, a back entrance to the building that was not observable on camera, and it was possible for individuals to come and go by that entrance without being picked up on the videotape. It was also possible for individuals to come and go by the front entrance before and after the times the camera was running.

In the course of his undercover activity, Lundrigan went to 44 Maple Street to buy crack cocaine on November 3, 1997. Once inside the house, he saw four people, two men and two women. One of the women identified herself to Lundrigan as "Lisa." This woman was subsequently identified by police as Julieanna Shea. The second woman accepted payment from Lundrigan for .9 grams of crack cocaine. Lundrigan described this woman as "in her thirties with tattoos on her left arm. She had dirty blond, shoulder length, straight hair." Am. Compl. at ¶ 11. Lundrigan

was later told by another dealer in the house that this woman's name was "Julie."

On November 20, 1997, a federal grand jury indicted eight individuals in connection with sales of crack cocaine at 44 Maple Street. An arrest warrant was issued for a "Jane Doe known as 'Julie.'" The next day a search warrant was executed at 44 Maple Street and several individuals were arrested. The woman who had sold crack cocaine to Lundrigan on November 3 was not present. On November 24, Lundrigan was asked to look at three potential suspects in an attempt to identify this woman. Lundrigan observed Julie Maynard, a woman who had been seen at the 44 Maple Street house and who fit the rough description he had provided. Lundrigan denied that she was the one who had sold him the drugs. Upon being shown another woman at a local drop-in center, he stated that she was not the woman who had sold him the drugs either.

The Defendants also went to the apartment building where Lisa Hutchins and her son Dustin resided. Lisa Hutchins had been to 44 Maple Street three times during the first two weeks of October. Defendant Peterson wanted Lundrigan to see Hutchins because she fit the general description of the woman known as "Julie," because she had been to 44 Maple Street, and because he believed her to have had "prior associations with persons known to use and/or sell illegal drugs." Peterson Aff. at ¶ 9 (Doc.

98, Ex. C).

Defendants L'Esperance and Peterson asked Lisa Hutchins questions about any involvement in drug sales at 44 Maple Street, which she denied, and L'Esperance asked her to come to her front porch to see if someone could identify her as having sold crack cocaine. Hutchins complied, saying "no problem." From his vehicle about one hundred feet away, Lundrigan signaled that Hutchins was the woman who sold him crack cocaine on November 3.

Hutchins was placed under arrest and transported to the state police barracks. At the barracks, according to Hutchins, Lundrigan asked "Do you remember me?" Hutchins replied, "No, am I supposed to?" Hutchins was lodged overnight at a correctional facility in New Hampshire, where she was strip-searched by a female correctional officer. The following day she was arraigned in federal district court on felony drug charges, and released on conditions that included restrictions on travel and a curfew.

On April 29, 1998 the Court granted the government's motion to dismiss the indictment against her without prejudice. Defendants Peterson and Lundrigan have sworn that, prior to the government's decision to seek dismissal of the charge, they were unaware of any information that would indicate that Lisa Hutchins was not the woman who sold the crack cocaine to Lundrigan. Defendant L'Esperance also stated that he was unaware of evidence that would exculpate Hutchins, but admitted that he had

interviewed a friend of Hutchins who said she had introduced her at the house after the date of the drug sale. For the purposes of resolving these motions, however, the Defendants concede that Lisa Hutchins was mistakenly identified.

This lawsuit was removed to federal court from the Superior Court for Windham County, Vermont, on December 8, 2000. A motion to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim was denied on March 14, 2001. See Hutchins v. Peterson, 139 F. Supp. 2d 575 (D. Vt. 2001).

The amended complaint claims in Count I that the Defendants deprived Lisa Hutchins of "civil rights secured by the Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution, including the right to be secure against unreasonable search of one's person, the right to be secure in one's person, and the right not to be deprived of liberty without due process of law." Am. Compl. at ¶ 40. Count II makes a similar claim under the Vermont Constitution's Chapter I, Articles 1, 9, 10 and 11, "all in violation of Vermont Constitution Chapter II, § 71." Am. Compl. at ¶ 43. Count III alleges state common law torts of invasion of privacy, false arrest, false imprisonment and malicious prosecution, and a loss of parental consortium claim on behalf of Dustin Hutchins. Am. Compl. at ¶ 45-48.

II. Summary Judgment Standard

Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The initial burden is on the moving party to identify "those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)); accord Koch v. Town of Brattleboro, Vt., 287 F.3d 162, 165 (2d Cir. 2002).

When a motion for summary judgment is made and so supported, the nonmoving party "may not rest upon mere allegation," "but must set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986) (citing Fed. R. Civ. P. 56(e)). The nonmoving party "'may not rely simply on conclusory statements or on contentions that the affidavits supporting the motion are not credible.'" Burt Rigid Box, Inc. v. Travelers Prop. Cas. Corp., 302 F.3d 83, 91 (2d Cir. 2002) (quoting Goenaga v. March of Dimes Birth Defects Found., 51 F.3d 14, 18 (2d Cir. 1995)).

A factual dispute between the parties will not defeat a properly supported motion for summary judgment unless the dispute concerns a "genuine issue of material fact." Anderson, 477 U.S.

at 248. A fact is material when it affects the outcome of the suit under the governing law, and a dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. See id.; see also Burt Rigid Box, 302 F.3d at 90-91.

In ruling on a motion for summary judgment, the evidence of the nonmoving party is to be believed, and all justifiable inferences are to be drawn in its favor. Anderson, 477 U.S. at 255 (citing Adickes v. S. H. Kress & Co., 398 U.S. 144, 158-59 (1970)). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial,'" and summary judgment is warranted. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting First Nat. Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 289 (1968)).

III. Discussion

A. Claims Based on the United States Constitution

All Defendants claim they are entitled to qualified immunity on the constitutional violations alleged in Count I. The United States Supreme Court has recently discussed the appropriate framework for determining immunity from suit: a court must first inquire whether "[t]aken in the light most favorable to the party asserting the injury, . . . the facts alleged show the officer's conduct violated a constitutional right." Saucier v. Katz, 533

U.S. 194, 201 (2001). "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries," and the officer is entitled to immunity from suit. Id.; accord Loria v. Gorman, No. 01-7964, ___ F.3d ___, 2002 WL 31122154, at *6 (2d Cir. Sept. 26, 2002). If the facts show that an officer's conduct violated a constitutional right, the court must then "determine whether that right was clearly established," in other words, "'whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" Caldarola v. Calabrese, 298 F.3d 156, 160 (2d Cir. 2002) (quoting Saucier, 533 U.S. at 202).

Essentially, Hutchins alleges that her federal constitutional rights were violated because she was arrested and prosecuted without probable cause. Without a doubt, one has a constitutional right not to be arrested without probable cause. See Martinez v. Simonetti, 202 F.3d 625, 634 (2d Cir. 2000). If the facts alleged show that the officers had probable cause to arrest Hutchins, however, then they are entitled to qualified immunity for their actions in arresting her.¹

¹ Hutchins protests that a trial is required to determine whether or not she was arrested pursuant to the allegedly invalid "Jane Doe known as 'Julie'" warrant. If the officers had probable cause to arrest Hutchins without a warrant, the issue of the validity of the arrest warrant is irrelevant. Moreover, the officers assert that they did not rely on the arrest warrant, and Hutchins has offered no evidence that would refute their

Probable cause to arrest exists "when the officers have knowledge or reasonably trustworthy information of facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that the person to be arrested has committed or is committing a crime." Weyant v. Okst, 101 F.3d 845, 852 (2d Cir. 1996). Hutchins argues that the Defendants lacked a reasonable belief that she was the individual whom Lundrigan encountered at 44 Maple Street on November 3, 1997, because L'Esperance's investigative file contained an undated diagram of the crack cocaine purchases at the property that included the name of Julie Maynard and omitted any reference to her. The diagram lists the individuals involved in the November 3 sale as Norman Bills, Julieanna Shea and Julie Maynard.

Hutchins also points out that the videotape from November 3 shows that Julie Maynard and her dog were on the premises that day, and that Lundrigan's wire recorded a dog bark during the drug deal. She stresses that she did not match the description Lundrigan gave: Hutchins, 28, had blonde, wavy hair that reached well below her shoulders and tattoos on both arms and hands. Finally, she offers the sworn statement of Julieanna Shea, the other woman present at the November 3 drug sale. In a statement prepared from an interview on March 17, 1998 and sworn to on

assertion.

March 14, 2002, Shea stated that she had never met Hutchins, and that Julie Maynard was the woman who sold crack cocaine to Lundrigan on November 3. Goderre Mem. of March 17, 1998 (Doc. 118, App. E).

"Officers can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause . . . and in those situations courts will not hold that they have violated the Constitution." Saucier, 533 U.S. at 206; see also Loria, 2002 WL 31122154 at *13 (probable cause is an assessment of probabilities, not an ascertainment of truths); Bernard v. United States, 25 F.3d 98, 102 (2d Cir. 1994) (probable cause can exist even when based on mistaken information, if arresting officer acted reasonably and in good faith). The determination of probable cause thus does not depend on whether Lundrigan's identification was accurate, but on whether the officers reasonably relied on Lundrigan's identification, based on the totality of the circumstances. See id.

Law enforcement officials ordinarily have probable cause to arrest based on eyewitness information, particularly if the eyewitness information comes from a fellow police officer, unless the circumstances raise doubt as to the witness's veracity. See Curley v. Vill. of Suffern, 268 F.3d 65, 70 (2d Cir. 2001) (citing Singer v. Fulton County Sheriff, 63 F.3d 110, 119 (2d Cir. 1995)); Martinez, 202 F.3d at 634; Bernard, 25 F.3d at 102-

03. Furthermore, in evaluating the probable cause determination, only the facts available to the officers at the time of the arrest are considered.² Martinez, 202 F.3d at 635.

Taking the facts in the light most favorable to Hutchins, the officers were aware of the following on November 24, 1997. Julie Maynard was a suspect, known to be a resident and/or a dealer at 44 Maple Street. She was a user of crack cocaine. She was present on the day of the crack cocaine sale to Lundrigan. She owned a dog, who was with her that day. A dog was heard to bark on the audio tape of the drug transaction. Maynard fit the general description Lundrigan had given of the woman who had sold him the crack cocaine. L'Esperance and others involved in the investigation suspected that Maynard was the culprit. Julieanna Shea was then in custody in another part of the state; her willingness to identify the woman who sold the crack cocaine on November 3 (and implicate herself in the process) was unknown at that time. Lundrigan took a look at Maynard and denied that she was the person who sold him the crack cocaine. Hutchins arguably did not fit the physical description particularly well, although she did have long light hair and tattoos on her forearms. She was thought to have an association with some of the people at 44 Maple Street. Lundrigan identified her positively as the woman

² The Shea affidavit therefore can play no part in determining whether the police officers had probable cause.

who sold him the crack cocaine.

Based on the totality of the circumstances, probable cause existed to arrest Hutchins. L'Esperance and Peterson reasonably relied on Lundrigan's identification of her, based on his having transacted a hand to hand sale three weeks before, and his having rejected Maynard, their more likely candidate, as the unknown "Julie."³ Assuming that the diagram from L'Esperance's investigative file was created before Hutchins' arrest, it is information that suggests another culprit, but does not negate Hutchins' involvement. This and other arguably exculpatory evidence known to the officers warranted the officers' caution in eliminating Maynard as the suspect before looking to another, but did not give them reason to doubt Lundrigan's veracity, nor to believe that his identification would be unreliable. "[A] police officer 'is not required to explore and eliminate every theoretically plausible claim of innocence before making an arrest.'" Martinez, 202 F.3d at 635 (quoting Ricciuti v. N.Y.C. Transit Auth., 124 F.3d 123, 128 (2d Cir. 1997)).

Hutchins appears to concede that the Defendants are not liable for her strip search at a New Hampshire county jail

³ Assuming Lundrigan incorrectly identified the woman from whom he bought the crack cocaine, whether he made a simple mistake or a deliberate misidentification is irrelevant for purposes of the qualified immunity determination. See Singer, 63 F.3d at 119 (motivation is not a consideration in assessing probable cause).

following her arrest if probable cause existed to arrest her. See Pls.' Opp. at 21. She has not argued that, regardless of the legality of her arrest, the strip search itself offended the Fourth Amendment. She contends only that the Defendants are responsible because they caused her illegal arrest; accordingly the conclusion that probable cause existed to arrest Hutchins disposes of the unreasonable search claim as well.

Hutchins' amended complaint may also be read as claiming a Fourth Amendment violation in having been lodged overnight and having had restrictions on her liberty for more than five months between her arrest and the dismissal of her charges. Overnight detention and the imposition of restrictive conditions of release constitute a seizure for Fourth Amendment purposes. See Murphy v. Lynn, 118 F.3d 938, 946 (2d Cir. 1997). The Fourth Amendment proscribes only unreasonable searches and seizures, however; the question whether this seizure was unreasonable is basically a question whether the criminal proceeding against Hutchins was instituted without probable cause. See id.; see also Golino v. City of New Haven, 950 F.2d 864, 870 (2d Cir. 1991) (right not to be prosecuted without probable cause has long been a clearly established constitutional right).

At trial Hutchins would bear the burden of demonstrating

that the officers lacked probable cause to proceed against her.⁴ Her evidence that the proceedings against her were unfounded consists of the undated diagram from L'Esperance's investigative file that listed three individuals involved in the November 3 crack cocaine transaction, none of whom were Hutchins; a local newspaper article dated after the raid on 44 Maple Street that relied on an "official source close to the investigation" in describing the suspect remaining at large as a black woman; and L'Esperance's information that a friend of Hutchins placed her at the property only after the drug sale. Taken as a whole, this evidence could be regarded as exculpatory; it could be regarded as creating a reasonable doubt of Hutchins' guilt in the minds of jurors at a criminal trial; but it does not eliminate probable cause to proceed against her.

Hutchins also suggests that the officers' failure to disclose their possession of this exculpatory evidence following her arrest was so egregious as to constitute a violation of substantive due process. This suggestion lacks legal support. A brief post-arrest incarceration pursuant to an arrest based upon probable cause does not violate the Constitution. See Baker v. McCollan, 443 U.S. 137, 144 (1979) (post-arrest detention based

⁴ This probable cause determination may not be identical to the determination of probable cause to arrest. See Posr v. Court Officer Shield No. 207, 180 F.3d 409, 417 (2d Cir. 1999) (under New York law the two determinations are not interchangeable).

on mistaken identity gives rise to no claim under United States Constitution). Moreover, the Supreme Court has not recognized a substantive due process right to be free of prosecution without probable cause, concluding that such a claim must be judged under the Fourth Amendment. See Albright v. Oliver, 510 U.S. 266, 268, 271 (1994) (plurality op.).

Finally, Hutchins appears to have waived her claim of injury based on a violation of the Ninth Amendment, having failed to respond to the Defendants' argument that the Ninth Amendment provides no basis for a civil rights action. The Court notes that case law supports the Defendants' position. See, e.g., Froehlich v. State of Wis. Dep't of Corr., 196 F.3d 800, 801 (7th Cir. 1999); Vega-Rodriguez v. P.R. Tel. Co., 110 F.3d 174, 182 (1st Cir. 1997); Schowengerdt v. United States, 944 F.2d 483, 490 (9th Cir. 1991); Gibson v. Matthews, 926 F.2d 532, 537 (6th Cir. 1991); People United for Children, Inc. v. City of N.Y., 108 F. Supp. 2d 275, 300 n.19 (S.D.N.Y. 2000); In re State Police Litig., 888 F. Supp. 1235, 1258 (D. Conn. 1995); see also Laurence H. Tribe, *American Constitutional Law* 776 n.14 (2d ed. 1988) (Ninth Amendment not itself a source of rights).

Because the evidence, taken in the light most favorable to Hutchins, fails to establish that the officers' conduct violated her federal constitutional rights, Defendants Peterson, Lundrigan and L'Esperance are entitled to summary judgment on Count I of

the Amended Complaint.

B. State constitution and common law claims

____ Pursuant to 28 U.S.C. § 1367(c)(3) a district court may decline to exercise supplemental jurisdiction over state law claims if it has dismissed all claims over which it has original jurisdiction. There are no federal claims remaining in the case; accordingly, the state constitutional and common law claims are remanded to state court. See Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 351 (1988) (district court has discretion to remand when exercise of pendent jurisdiction would be inappropriate).

Dated at Burlington, Vermont this ____ day of October, 2002.

William K. Sessions III
Chief Judge